A

ODANG v. PP & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
RAVINTHRAN PARAMAGURU JCA
CHE MOHD RUZIMA GHAZALI JCA
AZMI ARIFFIN JCA
B [CRIMINAL APPEAL NOS: Q-05(SH)-477-11-2021
& Q-05-487-12-2021]
24 JUNE 2024

C **Abstract** – *(i) The burden to prove a general exception defence such as private defence is on the accused. If the accused chases the deceased to stab him, such attack infringes s. 99(4) of the Penal Code ('PC'). It also takes the right of the accused to defend himself outside the ambit of s. 100 of the PC as there cannot be any reasonable apprehension on the part of the accused that he could be killed or grievously injured when the* D *deceased has fled the scene. In such a situation, the accused has not acted within the circumscribed limits of his right to private defence; (ii) An essential precondition for the invocation of private defence under exception 2 of s. 300 of the PC is that there must be no intention to cause more harm than necessary. If the accused pursues the deceased after the* E *danger from him has ceased and attacks him further, the pre-conditions of 'without premeditation' and 'without any intention of doing more harm than is necessary' are thus not met.*

F ***CRIMINAL LAW:*** *Penal Code – Section 302 – Murder – Private defence – Whether accused acted within circumscribed limits of right to private defence – Whether accused vindictively pursued deceased when danger had ceased – Whether pre-conditions of 'without premeditation' and 'more harm than necessary' met – Whether defence of private defence under s. 96 of Penal Code rejected – Whether accused could avail himself of private defence in exception 2 of s. 300 of Penal Code* G *– Whether act of accused in causing death of deceased fell within definition of murder or culpable homicide not amounting to murder*

CRIMINAL LAW: *Penal Code – Section 302 – Murder – Sudden fight – Whether accused chased deceased for long distance to stab him – Whether accused took* H *advantage or acted in cruel manner towards deceased – Whether accused came within special exceptions of s. 300 of Penal Code – Whether act of accused in causing death of deceased fell within definition of murder or culpable homicide not amounting to murder*

I The appellant was charged under s. 302 of the Penal Code for the offence of murder. The case for the prosecution was based on the eyewitness evidence of PW11, who had accompanied the accused to an estate road to meet the deceased on 20 February 2019 at around 9pm. PW11 saw a man, later

identified as the deceased, standing beside a motorcycle in the dim moonlight ('motorcycle area'). The deceased had asked the accused whether he wanted to buy drugs and the accused refused. The deceased had then asked the accused to lend him RM1,000. When the accused rejected the request, the deceased drew a knife that was still in its sheath from his waist. PW11 warned the accused about it. It was then the accused drew his own knife and stabbed the deceased in the left lower back. The deceased then fled along the estate road. PW11 said that the accused, still carrying his knife, pursued and chased the deceased for a distance of 200 to 400 metres. Feeling afraid, PW11 ran home. The body of the deceased was discovered lying along the same road in the morning at 7.20am. In the course of the police investigation, the accused gave information that led to the discovery of the knife that was used to stab the deceased. The pathologist who conducted the autopsy noted that there were three stab wounds on the trunk of the body, and the cause of death was due to chest and intra-abdominal injuries caused by stab wounds. At the conclusion of the prosecution's case, the Judicial Commissioner ('JC') found that a *prima facie* case had been established which, if unrebutted, would warrant conviction. The accused was called to enter his defence. The accused did not deny stabbing the deceased, but testified that a scuffle had ensued as the deceased had attempted to search for money in the pocket of the accused. PW11 had shouted a warning that the deceased had pulled out his knife and the accused then stabbed the deceased twice, once in the chest and once in the back. After that, the accused had chased the deceased and upon catching up with him, stabbed him again to make sure that he was helpless and could not retaliate. The accused said that he stabbed the deceased again because he thought the deceased would fight back and that the third stab wound that he inflicted was not a deep wound. The accused relied on private defence or self-defence under s. 96 of the Penal Code ('PC') which, if successful, would have entitled him to an acquittal. In the alternative, the accused relied on the exceptions to s. 300 of the PC that, if applicable, would result in the lesser finding of culpable homicide not amounting to murder under s. 304(a) of the Penal Code. At the High Court, the JC rejected the plea of self-defence because the accused gave evidence that he chased the deceased and stabbed him again. The JC held that in doing so, the accused had exceeded the right to private defence. However, the JC found that the fourth exception to s. 300, *ie,* sudden fight, applied. In the premises, the JC acquitted the accused of the charge of murder and convicted him for the lesser offence of culpable homicide not amounting to murder under s. 304(a) of the PC. The punishment imposed on the accused was 13 years' imprisonment from the date of arrest. Aggrieved, the accused appealed against the conviction and sentence under s. 304(a) of the PC ('first appeal'). Dissatisfied, the prosecution appealed against the decision of the High Court to acquit the accused of the murder charge and convict him for the lesser offence under s. 304(a) of the PC ('second appeal'). The principal issues that

arose were: (i) whether the act of the accused in causing the death of the deceased fell within the definition of murder or culpable homicide not amounting to murder; and (ii) whether the accused was entitled to an outright acquittal because of the defences raised.

Held (allowing prosecution's appeal; dismissing accused's appeal)
Per Ravinthran Paramaguru JCA delivering the judgment of the court:

(1) The burden to prove a general exception defence such as private defence is on the accused and it must be discharged on a balance of probabilities (s. 105 of the Evidence Act 1950). The JC may not have erred in not finding fault with the accused for taking decisive action immediately by taking out his knife. A person under attack, cannot in a moment of anguish, be expected to 'weigh to a nicety the exact measure of his necessary defensive action.' However, the accused did not act within the circumscribed limits to private defence. After having stabbed the deceased in the back with a lethal weapon, he chased him over a distance of 400 metres and stabbed him again. The second attack on the deceased infringed s. 99(4) of the PC as it was not necessary for the defence of the accused. It also took the right of the accused to defend himself outside the ambit of s. 100 of the PC as there could not be any reasonable apprehension on the part of the accused that he could be killed or grievously injured. The wounded deceased was fleeing the scene at that time. (paras 46-49)

(2) Even if the right to private defence accrued to the accused at the motorcycle area when the deceased took out his knife, it could not continue when the danger had ceased. As the deceased had fled such a significant distance away from the initial encounter, it was not reasonable for the accused to say that the deceased might return and attack him. All that the accused needed to do to stay safe was to walk home in the opposite direction, as PW11 did. Instead, the accused vindictively pursued the deceased and snuffed out his life. The JC had correctly rejected the defence of private defence under s. 96 of the PC. (para 51)

(3) The successful invocation of private defence under exception 2 of s. 300 of the PC can reduce a murder charge to the lesser offence of culpable homicide not amounting to murder. An essential precondition for the invocation of this provision was that there must be no intention to cause more harm than necessary. The accused had pursued the deceased after the danger from him had ceased and attacked him further. Therefore, the pre-conditions of 'without premeditation' and 'without any intention of doing more harm than is necessary' were not met. For this reason, the appellant could not avail himself of the private defence in exception 2 of s. 300 of the PC either. (paras 52 & 53)

(4) The accused himself said that he had chased the deceased to ensure that he did not retaliate. The body of the deceased was found 400 metres from the motorcycle. Since the accused chased the deceased for a long distance to finish him off, it could not be said that his act was not premeditated. Further, the accused could not claim he did not take advantage or did not act in a cruel manner towards the deceased. The initial stab wound inflicted by the accused on the deceased's back was deep, as confirmed by the pathologist. Despite this, the accused relentless pursued and stabbed the deceased again with his deadly knife. Since the act of the accused did not come within any of the special exceptions including special exception 4, the JC should have convicted him of murder. Therefore, the appeal of the prosecution had merit. (paras 59 & 60)

(5) The JC had given careful consideration to the case for the defence. The JC had applied the correct standard of proof in calling for the defence of the accused and did not approach the case for the defence as if the prosecution had proven its case beyond reasonable doubt. The appeal of the prosecution was allowed and the order of the High Court was substituted with one of conviction under s. 302 of the PC. The decision of the High Court to record a conviction under s. 304(a) of the PC was set aside. The appeal of the accused was dismissed. As the accused was a first offender and that it was the deceased who initiated the fateful meeting to do a drug transaction, he was sentenced to 30 years of imprisonment from the date of arrest and 12 strokes of the rotan. (paras 62-66)

Case(s) referred to:
Lee Thian Beng v. PP [1971] CLJU 61; [1971] 1 LNS 61 FC ***(refd)***
Palmer v. R [1971] 2 WLR 831 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 105
Penal Code, ss. 99(4), 100, 101, 102, 300, 304(a)

For the appellant - Mohd Amril Johari; DPP
For the respondent - Ranbir Singh Sangha; M/s Ranbir S Sangha & Co

[Editor's note: For the High Court judgment, please see PP v. Odang [2021] CLJU 1888; [2021] 1 LNS 1888 (overruled in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

Ravinthran Paramaguru JCA:

Introduction

[1] There are two appeals before us. Both appeals arise from the same murder trial. The accused was charged as follows:

A That you, ODANG (PASSPORT NO: AS 952609) between 9.30 pm on 20th February 2019 and 7.20 am on the 21st February 2019, at Block 89 A, Ladang Rinwood, Kenyana Estate, in the district of Mukah, in the State of Sarawak, committed murder by causing the death of RIANTO (M) (PASSPORT NO: A 7734680), and thereby you have committed an offence punishable under Section 302 of the Penal Code.

B

[2] At the conclusion of the trial, the accused was found guilty of the lesser offence of culpable homicide not amounting to murder under s. 304(a) of the Penal Code. He was sentenced to 13 years imprisonment from the date of arrest. In the first appeal, the accused has appealed against the conviction and sentence under s. 304(a) of the Penal Code. In the second appeal, the
C Public Prosecutor has appealed against the decision of the High Court to acquit the accused of the murder charge and convict him for the lesser offence under s. 304(a) of the Penal Code.

Case For The Prosecution

D **[3]** The case for the prosecution was based on the eyewitness evidence of Puddin Sampara (PW11). The brief facts extracted from the judgment of the High Court are as follows. He and the accused lived in an oil palm plantation known as Ladang Rinwood in Mukah District. On 20 February 2019 at around 9pm, the accused asked PW11 to accompany him to see someone that
E he had not met before. They reached an estate road near Block 90 of the estate at around 9.30pm. The area was unlit and deserted.

[4] PW11 saw a man, later identified as the deceased victim, standing beside a motorcycle in the dim moonlight. We shall refer to this place as the motorcycle area. When PW11 and the accused approached him, the man
F asked the accused whether he wanted to buy drugs for RM1,000. PW11 said the accused refused and said he did not want to consume drugs or be involved in drug activities anymore. The deceased then asked the accused to lend him RM1,000. When the accused rejected the request, the deceased drew a knife that was still in its sheath from his waist. PW11 warned the accused about
G it. It was then that the accused drew his own knife and stabbed the deceased in the left lower back. PW11 said that the deceased did not manage to unsheathe his knife. To a specific question by the DPP, PW11 said that the accused stabbed the deceased only once. During cross-examination, it was never put to PW11 that the accused stabbed the deceased more than once at
H the motorcycle area where they met him. The deceased then fled along the estate road. PW11 said that the accused, still carrying his knife, pursued and chased the deceased for a distance of 200 to 400 metres. Feeling afraid, PW11 ran home. His wife was called as a witness. She confirmed that her husband came home around midnight and told her that the accused had attacked someone.

I

[5] The body of the deceased was discovered lying along the same road in the morning at 7.20am by a plantation worker (PW3), who reported it to his manager (PW2). The police were notified. In the course of the police investigation, the accused gave information that led to the discovery of the knife (P18A) that was used to stab the deceased.

[6] The pathologist who conducted the autopsy was Dr Norliza binti Ibrahim. She recorded in the autopsy report that she noted three stab wounds on the trunk of the body. She said that the cause of death was due to chest and intra-abdominal injuries caused by stab wounds. She referred to the injury on the chest as injury No. 1 and that to the back as injury No. 3. These injuries were fatal in nature. She said injury No. 2 on the front chest was not "significantly fatal". She also said that the stab wounds on the body could have been inflicted with the knife discovered pursuant to information from the accused. In the submissions, the fatal injuries to the chest and the back are referred to as injury 1 and 2. In order to avoid confusion, we will refer to the three injuries as follows: the fatal injury on the chest, the non-fatal injury on the chest, and the fatal injury on the back.

[7] Insp Mohamad Haslee bin Spaiee (PW14), the investigating officer of the case, said that the deceased body was found 400 metres from the motorcycle that was used by him.

High Court Decision At The End Of The Prosecution's Case

[8] At the conclusion of the prosecution's case, the learned Judicial Commissioner found that a *prima facie* case had been established, which, if unrebutted, would warrant a conviction. He called the accused to enter his defence.

The Defence

[9] The only witness for the defence was the accused. He elected to give sworn testimony. He did not deny stabbing the deceased. He said as follows.

[10] On 20 February 2019, at around 8.30pm, he was watching television in his quarters when the deceased asked him to do a drug deal, namely "syabu". The accused said that he will meet the deceased outside the camp near Block 90. As PW11 was coincidentally outside the house, the accused asked him to accompany him. The accused armed himself with a Bugis knife known as "badek" to his rendezvous with the deceased. It is a lethal weapon, measuring 30cm in length and 6cm in width.

[11] After a 20-minute walk, the pair met with the deceased along the plantation gravel road. The accused could see the deceased because of the moonlight. The deceased offered to sell syabu for RM1,000 but the accused rejected it. The deceased then asked for a loan for the same sum. Again, the accused rejected the request. A scuffle ensued as the deceased attempted to

search for money in the pocket of the accused. PW11 shouted a warning that the deceased had pulled out his knife. The accused then stabbed the deceased twice, once in the chest and once in the back. After that, he chased the deceased and upon catching up with him, stabbed him again to make sure that he was helpless and could not retaliate. The accused said that he stabbed him again because he thought the deceased would fight back. The third stab wound that he inflicted was not a deep wound. He said the distance that he covered to catch up with the deceased was about 400 metres. After that, the accused returned to his quarters. The next morning, he discarded his knife.

[12] The accused relied on private defence or self-defence under s. 96 of the Penal Code, which, if successful, would have entitled him to an acquittal. In the alternative, the accused relied on the exceptions to s. 300 of the Penal Code that, if applicable, would result in the lesser finding of culpable homicide not amounting to murder under s. 304(a) of the Penal Code.

High Court Decision At The End Of The Case For Defence

[13] After considering the evidence of the accused and the submissions of his counsel, the learned Judicial Commissioner noted that the time and place of death were not disputed. He also noted that the accused did not dispute causing the death of the deceased. What was disputed was whether the act of the accused in causing death amounted to murder.

[14] The learned Judicial Commissioner rejected the plea of self-defence because the accused gave evidence that he chased the deceased and stabbed him again. The learned Judicial Commissioner Judge said that in doing so, he exceeded the right to private defence. However, he found that the fourth exception to s. 300, *ie*, sudden fight, applied.

[15] In the premises, His Lordship acquitted the accused of the charge of murder and convicted him for the lesser of offence of culpable homicide not amounting to murder under s. 304(a) of the Penal Code. The punishment imposed on the accused was 13 years' imprisonment from the date of arrest.

Issues In The Appeals

[16] As we said earlier, the prosecution appealed against the acquittal on the charge of murder and the accused appealed against the conviction for the lesser offence under s. 304(a). We heard both appeals together. We shall deal with both appeals together as they arise from the same charge.

Undisputed Facts

[17] At the outset, we shall briefly set out some facts that were not disputed. There is overwhelming evidence to support some of the facts found by the learned Judicial Commissioner. The identity of the deceased and the assailant was not disputed. The cause of death was not disputed either. He

died of stab wounds consistent with injuries that could have been inflicted with the Bugis knife recovered pursuant to information given by the accused. The evidence of the pathologist on this point was not successfully challenged. The evidence of the investigating officer that the knife was recovered due to information given by the accused was not rebutted either. The evidence of the chemist that the blood stains found on the Bugis knife belonged to the deceased was not challenged either.

[18] Finally, the crucial evidence in respect of causation was not disputed. PW11 testified that the accused stabbed the deceased once in the back at the motorcycle area. After defence was called, the accused admitted stabbing the deceased more than once with his Bugis knife. However, he was inconsistent when asked whether he stabbed the deceased twice at the initial encounter. To a question by the DPP, he said that he stabbed the deceased once at the motorcycle area. Later, he said that he stabbed the deceased twice at the motorcycle area and once after he caught up with him when he ran away. On the other hand, PW11 consistently said that the accused stabbed the deceased only once at the motorcycle area.

[19] The principal issues that arise are whether the act of the accused in causing the death of the deceased falls within the definition of murder or culpable homicide not amounting to murder and whether the accused is entitled to an outright acquittal because of the defences raised.

Argument Of Defence In The Appeals

[20] It will be recalled that the learned Judicial Commissioner rejected the plea of private defence under s. 96 of the Penal Code. Instead, he found that the act of the accused fell within exception 4 to s. 300 which is the special exception of sudden fight. This was the reason that he convicted the accused of the lesser offence of culpable homicide not amounting to murder under s. 304(a).

[21] Before us, learned counsel for the accused persons argued that the accused not only did not commit murder but also did not commit the lesser offence under s. 304(a) of the Penal Code. This argument was forcefully made despite the fact that in his sworn testimony, the accused admitted stabbing the deceased to death. He also admitted chasing the deceased over 400 metres after seriously wounding him with his lethal Bugis knife and stabbing him again to make sure he did not retaliate.

[22] According to counsel for the accused person, his argument is based on the "sequence of stabs" his client inflicted on the victim. He said the fatal wounds on the chest and the back were inflicted at the area where the deceased had parked his motorcycle. The accused is not guilty of any offence in inflicting these wounds because he acted in self-defence. As for the third wound, which counsel said was the non-fatal wound, it was inflicted after the

A accused chased the deceased down the estate road for over 400 metres. Since this wound, which, according to counsel for the accused persons, is a non-fatal wound, it follows that his client is not guilty of the lesser offence under s. 304(a) of the Penal Code either.

B **[23]** Counsel for the accused persons emphasised that the learned Judicial Commissioner failed to appreciate that the sequence of stabs, *ie*, the two fatal stabs and the non-fatal stab, is crucial in this case. If the learned Judicial Commissioner had done so, the accused would have been completely acquitted.

C **Argument Of Prosecution**

[24] Learned DPP argued that the finding of the High Court that the accused failed to prove private defence under s. 96 does not warrant interference. He submitted that PW11 testified that the accused stabbed the deceased only once in the back at the motorcycle area. This was also the D finding of the learned Judicial Commissioner. However, the accused chased the deceased and inflicted further injury with his knife. Therefore, the accused cannot avail either private defence or exception 4 of s. 300 of the Penal Code, *ie*, sudden fight. In the premises, learned DPP urged this court to allow the prosecution's appeal and dismiss the accused's appeal.

E **Sequence Of Injuries Inflicted On Deceased**

[25] We noted earlier that counsel for the accused person submitted that his client committed no offence because the two fatal injuries were inflicted at the motorcycle area and the non-fatal injury was inflicted later when the deceased was running away. We shall now consider the findings of the F learned Judicial Commissioner in respect of the injury inflicted at the motorcycle area and whether they warrant revisiting on the evidence presented by the prosecution. The learned Judicial Commissioner found as a fact that the deceased was stabbed once in the back at the motorcycle area and subsequently stabbed again after the accused chased him over a distance G of 400 metres. In paras. [10] and [11] of his judgment, His Lordship said as follows:

> [10] The Accused reacted by drawing his own knife, known as "badek" [Exhibit P18A] **which he then struck out against the deceased injuring the deceased on his left back.**
>
> H [11] Once the Deceased then ran away from the scene along the same oil palm estate road and the Accused gave chase. (emphasis added)

[26] In the abovementioned paragraphs, the learned Judicial Commissioner said that the accused stabbed the deceased in the back and after that, the deceased ran away. In para. [30], the learned Judicial Commissioner said that I the first stab was inflicted at the motorcycle area. His Lordship acknowledged that there was some dispute as to when the other two injuries were inflicted. But His Lordship was of the view that the sequence of stabs

is of "low significance in establishing the cause of death". Nonetheless, he referred to the stabbing in the back of the deceased as the "first stabbing" throughout his judgment and the para. [30] as well. Paragraph [30] reads as follows:

> [30] **Save for the first stabbing** which occurred when the Accused and Deceased **were at the scene when they were scuffling,** there was some dispute as to when the other two injuries were inflicted. I find that this argument is of low significance in establishing the cause of death. It is clear the Accused additionally stabbed the Deceased when he caught up with the Deceased a few hundred meters from the initial meeting place or first stabbing. The main issue is whether the stabbing were inflicted by the Accused, which has been found to be in the affirmative. The issue now is whether they were inflicted in self-defence, as alleged by the Accused. (emphasis added)

[27] In para. [49] of the judgment, the learned Judicial Commissioner again referred to the wound inflicted at the motorcycle area as the "first stabbing". He also said that when the accused caught up with the deceased, he "administered perhaps, the fatal blow". The said paragraph is as follows:

> [49] It is clear from the evidence including that from the Accused himself, that he, the Accused, after the first stabbing pursued the Deceased by foot as his instincts (no doubt nurtured by his Bugis upbringing and beliefs) led him to believe that he had to really disable the Deceased or faced retaliation. In short, he went beyond what is permitted in self-defence. When he caught up with the deceased he administered perhaps, the fatal blow on the Deceased.

[28] Thus, reading all the above passages, it is clear that the learned Judicial Commissioner had found that the first stab was inflicted in the back of the deceased. This finding is clearly supported by PW11, who is the star witness for the prosecution. PW11 only witnessed the stab wound inflicted at the motorcycle area. He said that the accused stabbed the deceased once in the back at the motorcycle. He witnessed the event from a distance of three metres. After that, the deceased ran away. PW11 was asked also specifically asked by the DPP about the number of times the accused stabbed the deceased at the motorcycle area. He said as follows:

> Q: To confirm the event, how many times did you see Odang struck this unknown person's body with his knife?
>
> Q: Once.

[29] During cross-examination, PW11 was never asked if he saw the accused stabbing the deceased twice, *ie*, once on the back and once in the front. The pathologist told the court that the fatal wounds, *ie*, the stab wound in the back and the stab wound in the chest were deep wounds because the length of the Bugis knife "is within the deepest stab wound". During the case for the defence, the accused told the court that when he was first warned by

PW11 that the deceased had taken out a knife, he swung his Bugis knife at the deceased. It struck him (terkena) in the chest and when the deceased turned around, he stabbed him in the back. Then, he chased the deceased and stabbed him in the chest again. However, he said that the third stab "was not too deep".

[30] It is granted that the learned Judicial Commissioner did not make a specific finding on the sequence of stabs. However, he noted that the deceased was stabbed in the back at the motorcycle area and that he was stabbed again fatally when the accused caught up with him. Based on the evidence of PW11 and the circumstances of the case, we are of the view that the learned Judicial Commissioner is not wrong in concluding that the accused inflicted the fatal chest injury after chasing the deceased. Our reasons are as follows.

[31] As we said previously, the evidence of PW11 that the accused inflicted only one stab wound on the back of the deceased at the motorcycle area was not challenged. It is crucial to note that during examination-in-chief, the accused did not directly say much about the sequence of injuries he inflicted on the deceased. Instead, he was asked by his counsel to refer to his cautioned statement (D1) that was admitted into evidence by the defence and to confirm whether what he said therein was true in respect of the sequence of injuries. The accused confirmed his cautioned statement in his court testimony.

[32] It is because the accused said that he first injured the deceased in the chest and then in the back in the motorcycle area, counsel for the accused persons has advanced the theory that the two fatal wounds were inflicted at the initial encounter and therefore the accused can avail the defence of private defence in s. 96 of the Penal Code. We shall now refer to the portion of the cautioned statement where the accused refers to the injuries that he inflicted on the deceased.

> Dalam masa yang sama kawan saya (Puddin) yang berdiri berdekatan saya, melihat pergerakan tangan lelaki itu mengeluarkan sesuatu objek seperti pisau dari poket seluar dan Puddin terus memberitahu saya supaya berhati-hati. Tanpa berlengah, saya pun turun sama mengeluarkan pisau (badek) yang saya **bawa dan saya menghayun pisau (badek) tersebut ke arah lelaki itu dan terkena bahagian dada lelaki itu.** Lelaki itu berpusing selepas terkena pisau tersebut dan saya terus menikam bahagain belakang badan lelaki itu. Akibat tikaman tersebut lelaki itu terus melarikan diri dari lokasi. …
>
> Saya menghampiri lelaki itu dan sekali lagi saya menikam lelaki itu di bahagian dada menyebabkan lelaki itu rebah …
>
> S: Berapa kali kamu menikam lelaki itu?

J: **Saya tikam lelaki itu sebanyak dua kali.** Satu di bahagian belakang badan dan satu di bahagian dada. Selain luka tikaman terdapat luka lain kerana **semasa saya menghayunkan pisau ke arah lelaki itu, dia cuba menepis dan saya tidak pasti bahagian mana badan lelaki itu yang kena.** (emphasis added)

[33] A thorough examination of what the accused said in court and in his cautioned statement contradicts the argument that both fatal injuries were inflicted at the motorcycle area.

[34] In the passages of the cautioned statement that we highlighted, the accused himself did not say that he stabbed the deceased deeply in the chest at the motorcycle area. He said that when PW11 warned him that the deceased was pulling out a knife, he swung his Bugis knife at him, causing an injury (terkena). He did not refer to this injury as an injury that resulted from stab wound that he inflicted. Moreover, it is noteworthy that when specifically asked by the recording officer how many stab wounds he had inflicted, he answered two. However, he could not have been referring to the chest wound at the motorcycle area as a stab wound as he was uncertain about which part of the deceased's front body was injured. We repeat his answer below:

J: **Saya tikam lelaki itu sebanyak dua kali.** Satu di bahagian belakang badan dan satu di bahagian dada. Selain luka tikaman terdapat luka lain kerana **semasa saya menghayunkan pisau ke arah lelaki itu, dia cuba menepis dan saya tidak pasti bahagian mana badan lelaki itu yang kena.** (emphasis added)

[35] Therefore, the second time he stabbed the deceased must have been after he had chased him down the road. This inference is supported by other evidence. PW11 said that the deceased was stabbed only once in the back at the motorcycle area. The pathologist said that the two fatal wounds, *ie*, in the back and the chest were deep and serious wounds. Thus, the fatal chest wound is the result of a deliberate and forceful stab. It is not the result of the accused swinging his knife at the deceased and hitting him (terkena). Moreover, the accused himself was not sure which part of the body of the deceased was injured when he swung his knife.

[36] The accused was also asked by his counsel twice during examination-in-chief why he chased the deceased after stabbing him in the back. This was his answer:

Q: After you inflicted the 1st and 2nd injuries on the deceased, why did you chase him?

A: After I inflicted the 1st and 2nd injuries, I thought the deceased was going to fight back, so I stabbed him one more time but not too deep.

…

A

Q: When the deceased ran away, why did you chase him?

A: I though he will come back again to attack me because the deceased's motorbike is still in the scene.

[37] In the abovementioned answers, the accused has admitted taking the trouble to chase the wounded deceased a great distance down a desolate road at night to make sure that the latter does not retaliate. In the premises, his claim that he did not "stab him too deep" is not believable. Therefore, his inconsistent answers during cross-examination by the DPP and re-examination by his counsel that he had inflicted one stab wound and later saying that he inflicted two stab wounds at the motorcycle area all point to an attempt to prop up a false narrative in respect of the sequence of injuries suffered by the deceased. The answers to the question of the DPP are as follows:

Q: Do you agree with me that at the first scene of incident which is where you had met the deceased with Puddin, **you have only struck once on the deceased?**

A: Agree. …

Q: So do you stand by your answer that **you had only struck once on the deceased at the first place of incident?**

A: Yes, I stand with my answer. … (emphasis added)

[38] However, during re-examination by his counsel, the accused retracted the above answers and gave no reasonable explanation for his inconsistency.

[39] For the above reasons, we are of the view that PW11's evidence that the accused inflicted only one serious stab in the back of the deceased at the motorcycle area, which was accepted by the learned Judicial Commissioner, is credible.

Private Defence

[40] Before the High Court and before us, counsel for the accused person argued that no offence was committed because he acted in self-defence when PW11 warned him about the deceased taking out a knife.

[41] Self-defence, which is termed as private defence, is provided in s. 96 of the Penal Code. If successful, it is a complete answer to a murder charge and the accused is entitled to an outright acquittal. However, in the subsequent sections, the Penal Code has provided constraints to prevent its abuse. In this regard, the following provisions are relevant to the facts of this case.

[42] Section 99(4) prohibits infliction of unnecessary harm when protecting oneself. It reads as follows:

(4) The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

[43] Section 100 enumerates the circumstances to which the right of private defence extends to causing death. The provision reads as follows:

> The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right is of any of the following descriptions:
>
> **(a) such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;**
>
> **(b) such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;**
>
> (c) an assault with the intention of committing rape;
>
> (d) an assault with the intention of gratifying unnatural lust;
>
> (e) an assault with the intention of kidnapping or abducting;
>
> (f) an assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release. (emphasis added)

[44] Section 101 enacts that if the act of the accused does not come under the above descriptions, the right of private defence does not extend to the voluntary causing of death of the assailant but only harm other than death.

[45] The learned Judicial Commissioner considered the plea of self-defence carefully but he rejected it. His Lordship justifiably found that the accused exceeded his right of private defence because he pursued and stabbed the deceased again after the apprehension of danger had ceased. His Lordship said as follows in the following paragraphs:

> [48] Having considered all the evidence in particular, the testimony of the Accused in his defense, I conclude that the Accused went beyond his right of private defence. Had the altercation between the Accused and the Deceased ended at the first scene where they first met, the Accused would likely be entitled to an acquittal. However, that was not what happened.
>
> [49] It is clear from the evidence including that from the Accused himself, that he, the Accused, after the first stabbing pursued the Deceased by foot as his instincts (no doubt nurtured by his Bugis upbringing and beliefs) led him to believe that he had to really disable the Deceased or faced retaliation. In short, he went beyond what is permitted in self-defence. When he caught up with the deceased he administered perhaps, the fatal blow on the Deceased.

[46] The burden to prove a general exception defence such as private defence is on the accused and it must be discharged on a balance of probabilities as stated in s. 105 of the Evidence Act 1950.

[47] Having given careful consideration to the reasoning of the learned Judicial Commissioner and the relevant provisions of the Penal Code, we are of the view that interference with the conclusion of His Lordship is not warranted.

[48] PW11 told the court that the knife that the deceased took out was still in its sheath and the distance between the deceased and the accused was about three metres. It was suggested that the accused could have attempted to run away. However, in our view, the learned Judicial Commissioner may not have erred in not finding fault with the accused for taking decisive action immediately by taking out his Bugis knife. A person under attack, cannot, in a moment of anguish, be expected to "weigh to a nicety the exact measure of his necessary defensive action" (see the judgment of Lord Morris of BorthY-Gest in *Palmer v. R* [1971] 2 WLR 831, which was cited by the former Federal Court in *Lee Thian Beng v. PP* [1971] CLJU 61; [1971] 1 LNS 61; [1972] 1 MLJ 248).

[49] However, we agree with the learned Judicial Commissioner that the accused did not act within the circumscribed limits of his right to private defence. After having stabbed the deceased in the back with a lethal weapon, he chased him over a distance of 400 metres and stabbed him again. The second attack on the deceased infringes s. 99(4) of the Penal Code as it was not necessary for the defence of the accused. It also takes the right of the accused to defend himself outside the ambit of s. 100 of the Penal Code as there could not be any reasonable apprehension on the part of the accused that he could be killed or grievously injured. The wounded deceased was fleeing the scene at that time.

[50] Section 102 of the Penal Code says that the right to private defence only continues as long the apprehension of danger persists. It reads as follows:

> The right of private defence of the body commences as soon as **a reasonable apprehension of danger to the body arises** from an attempt or threat to commit the offence, though the offence may not have been committed; and it continues as long **as such apprehension of danger to the body continues.** (emphasis added)

[51] Therefore, even if the right to private defence accrued to the accused at the motorcycle area when the deceased took out his knife, it cannot continue when the danger had ceased. In the instant case, as the deceased had fled such a significant distance away from the initial encounter, it is not reasonable for the accused to say that the deceased might return and attack him because he had left his motorcycle behind. All that the accused needed to do to stay safe was to walk home in the opposite direction, as his friend PW11 did. Instead, the accused vindictively pursued the deceased and snuffed out his life. For the above reasons, we find that the learned Judicial Commissioner correctly rejected the defence of private defence under s. 96 of the Penal Code.

[52] The High Court did not discuss whether exception 2 of s. 300 of the Penal Code applies in this case. Unlike the defence afforded in s. 96, exception 2 provides a limited defence. The successful invocation of private defence under exception 2 of s. 300 of the Penal Code can reduce a murder charge to the lesser offence of culpable homicide not amounting to murder. exception 2 reads as follows:

> Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and **without any intention of doing more harm than is necessary for the purpose of such defence.** (emphasis added)

[53] As stated in the embolden words, an essential pre-condition for the invocation of this provision is that there must be no intention to cause more harm than necessary. In the instant case, the accused pursued the deceased after the danger from him had ceased and attacked him further. Therefore, the pre-conditions of "without premedication" and "more harm than necessary" were not met. For this reason, the appellant cannot avail himself of the private defence in exception 2 of s. 300 of the Penal Code either.

Sudden Fight

[54] After finding that the accused failed to prove private defence, the learned Judicial Commissioner made a finding that there was a sudden fight between the accused and the deceased within the meaning of exception 4 of s. 300 of the Penal Code. This was the reason that His Lordship convicted the accused of the lesser of offence under s. 304(a) of the Penal Code instead of murder. This finding is the subject of the appeal of the Public Prosecutor.

[55] To appreciate the reasoning of the learned Judicial Commissioner, we reproduce below the brief passage from the judgment where a finding of sudden fight was arrived at after rejection of the defence of private defence. It is as follows:

> [52] The Accused then pursued the Deceased and inflicted more blows. The Accused said that he was scared the Deceased would return to hurt him, the Accused. So, with that in mind he pursued and stabbed the Deceased some more. The intention is to ensure that the Deceased could not return to retaliate. Bearing in mind the cultural background of the Accused and the Deceased, the sudden fight in semi darkness with knives drawn, the Accused's case falls within the Exception 4 of section 300 of the Penal Code.

[56] The learned Judicial Commissioner then quoted exception 4 of s. 300 of the Penal Code and concluded that "reliance of the self-defence by the accused has merit" and convicted the accused under s. 304(a) of the Penal Code. Given that the accused's self-defence claim was rejected in the passages

A we quoted and exception 4 is about sudden fight, it is evidently a typographical error. The learned Judicial Commissioner meant to say that the limited defence of sudden fight in exception 4 succeeded.

[57] We shall now consider whether on the evidence, the learned Judicial Commissioner was correct to conclude that exception 4 applies. The B provision reads as follows:

> Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

C

[58] The pre-conditions to this defence are as follows:

(i) absence of premeditation;

(ii) sudden fight in the heat of passion upon sudden quarrel;

D (iii) must not take undue advantage or act in a cruel or unusual manner.

[59] In this case, the accused himself said that he chased the deceased to ensure that he does not retaliate. The body of the deceased was found 400 metres from the motorcycle. Since the accused chased the deceased for a long distance to finish him off, it cannot be said that his act was not premeditated. E Further, the accused cannot claim that he did not take advantage or did not act in a cruel manner towards the deceased. The initial stab wound inflicted by the accused on the deceased's back was deep, as confirmed by the pathologist. Despite this, the accused relentlessly pursued and stabbed the deceased again with his deadly Bugis knife.

F **[60]** We are of the view that since the act of the accused does not come within any of the special exceptions, including special exception 4, the learned Judicial Commissioner should have convicted him of murder instead of over-emphasising his "cultural background" as justification for his behaviour. Therefore, we find that the appeal of the Public Prosecutor has G merit.

Other Issues

[61] For the sake of completeness, before we conclude, we shall address two other grounds raised in the petition of appeal by the accused. It was H argued that the learned Judicial Commissioner did not apply "the *prima facie* standard of proof at the close of the prosecution's case and had practically convicted the accused before the close of the defence case." The reason for this ground is because the learned Judicial Commissioner said as follows in his judgment:

I > [27] During the trial and at the conclusion of the Prosecutions' case, **I ruled that the Prosecution had proven the offence committed by the Accused beyond reasonable doubt** and ordered the Accused to enter upon his defence. The burden then shifted to the Accused to establish his defence on a balance of probabilities. (emphasis added)

[62] Although the learned Judicial Commissioner had said that the prosecution had proven the offence beyond reasonable doubt at the close of the prosecution's case, reading the judgment as a whole, it is clear that His Lordship gave careful consideration to the case for the defence. Furthermore, in the notes of proceedings (encl. 6, record of appeal vol. 2 at pdf p. 136), at the close of the prosecution's case, it is recorded that the learned Judicial Commissioner pronounced as follows in open court:

> Court: Decision after close of Prosecution's case
>
> I have reviewed both the evidence adduced by the prosecution in this case as well as the learned submissions from Counsels. I have studied the same as against the ingredients of Section 302 of the Penal Code which the accused is charged.
>
> I have asked myself that if the trial stops now, am I prepared to convict given the evidence adduced so far. My answer is in the affirmative.
>
> Pursuant to section 180(3) of the Criminal Procedure Code I find that a *prima facie* case has been made out against the accused on the offence which he is charged with.
>
> I therefore call upon the accused to enter on his defence.

[63] In the premises, regardless of the error in saying "beyond reasonable doubt" in the grounds of decision, the learned Judicial Commissioner applied the correct standard of proof in calling for the defence of the accused and did not approach the case for the defence as if the prosecution had proven its case beyond reasonable doubt.

[64] It was also argued that the learned Judicial Commissioner wrongly concluded that the accused knew the deceased before the events of the night in question. However, in our view, nothing much turns on this as the primary issue at the trial was whether the general exception and special exception defences succeeded.

Conclusion

[65] In conclusion, we shall allow the appeal of the Public Prosecutor and substitute the order of the High Court with one of conviction under s. 302 of the Penal Code. The decision of the High Court to record a conviction under s. 304(a) of the Penal Code is set aside. The appeal of the accused is dismissed.

[66] As the accused is a first offender and that it was the deceased who initiated the fateful meeting to do a drug transaction, we imposed 30 years imprisonment from the date of arrest and 12 strokes of the rotan.